On October 18, the Supreme Court issued a ruling keeping the current bar examination pass score of 1440 with an explanation that was, at best, perfunctory. Essentially, the Court said that while there was no basis for setting the current score (“the second highest in the nation”) in 1987, there was also no basis for changing it. The Court dismissed the information and data included in the State Bar’s Standard Setting Study and Final Report, as well as all the amicus letters, finding that they did not “weigh in favor of departing from the longstanding pass score of 1440.” While noting the serious flaws of the Standard Setting Study, the Court “encourage[d]” the State Bar to conduct more studies that “might bear on possible adjustment to the cut score.” The Court was no less forthcoming about when it might “revisit” the cut score “in the next review cycle, or sooner if the court so directs.” As commentators have noted, that review cycle would be seven years from now and could mean no change until 2024 at the earliest!

Many observers in and outside of the State of California were surprised by the ruling and mystified by the Court’s reasoning (or lack thereof). During the State Bar hearings, there was broad-based support for adjusting the pass score, at least on an interim basis, to somewhere between 1350 (the national mean) and 1390, including from, among others, the deans of 20 of the 21 ABA-accredited law schools in California, the Chairman of the Assembly Judiciary Committee, and the editorial board of the Los Angeles Times. Moreover, the Final Report of the State Bar, approved by the Bar’s Board of Trustees, included recommendations of adjusting the pass score on an interim basis to either 1410 or 1390 as an alternative to retaining 1440. Having asserted its authority to adjust the pass score in the new court rules announced in August, why would the Court not choose to exercise that authority to address this important policy issue in October?

The Court’s letter makes no more than a passing reference to the important policy issues of “reducing financial hardships for exam takers, and boosting the availability of competent and effective attorneys across all demographics and for all Californians.” Remarkably, the letter completely ignores compelling data in the Final Report of the impact that reducing the cut score to the national median would have on the diversity of the profession and access to justice. That data showed that, for the July 2016 exam alone, reducing the cut score to 1350 would have increased the number of African-American bar passers from 104 to 222 (113 percent), Hispanic passers from 379 to 663 (75 percent) and Asian passers from 676 to 1066 (58 percent). As the Los Angeles Times opinion succinctly stated about the impact of the change: “the ranks of lawyers in this state would have been a bit more representative of the population that enters and graduates from law school, and the population of clients who need legal counsel! What could or should be of more concern to a Court responsible for ensuring justice for all Californians?”

In the letter signed by the 20 ABA-accredited law school deans, the question before the Court was posed in the following way: “It perhaps seems natural to take the current cut score as a baseline, or even as the ‘right’ number simply because it is longstanding, and therefore seek to justify departures from it. We strongly disagree, as we have observed, that adherence to an unjustifiably high cut score should be the starting point of analysis. Instead, we ask the Court to imagine how this public policy issue would look if California’s cut score were already in the range of the national averages … We respectfully suggest that if our current cut score were in the 1350-1390 range, it is nearly impossible to imagine efforts to support an increase based on what we currently know, given that: (a) there would be no empirical evidence that a cut-score increase would improve the actual competence of California lawyers, (b) data suggest that there is no correlation between the cut score and the frequency of attorney discipline, and (c) compelling evidence indicates that the cut-score increase would adversely affect the diversity of the legal profession. We respectfully suggest that if we currently had a lower cut score, it is almost inconceivable that the Bar would propose or the Court would choose to set a cut score so far outside the practice of most States in the absence of strong evidence of meaningful and significant benefits. If, as we suggest, this evidentiary basis would not support an increase to an outlier cut core, we ask, finally, how does it support continuing an increase to an outlier cut score, we ask, finally, how does it support continuing to be an outlier in the face of these clear costs?”

All Californians, not just deans and law students, deserve answers to these questions. A policy that has such a disparate impact on minorities in our state should not be retained when there is no justification other than its having been in place for 30 years.

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